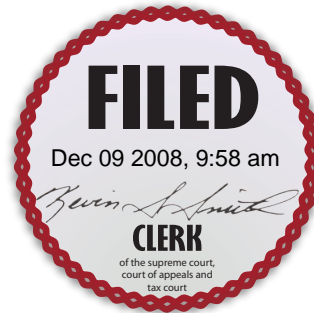


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**IN THE
COURT OF APPEALS OF INDIANA**

GUYDELL WATSON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 29A02-0803-CR-254
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE HAMILTON SUPERIOR COURT NO. 6
The Honorable Gail Bardach, Judge
Cause No. 29D06-0705-CM-1903

December 9, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Defendant-Appellant, Guydell Watson (Watson), appeals his conviction for operating a vehicle while intoxicated, endangering a person, a Class A misdemeanor, Ind. Code §§ 9-30-5-2(a) and 9-30-5-2(b).

We affirm.

ISSUES

Watson raises two issues on appeal, which we restate as follows:

- (1) Whether the trial court abused its discretion by admitting the results of the portable breath test; and
- (2) Whether there was sufficient evidence to find Watson guilty of operating a vehicle while intoxicated, endangering a person.

FACTS AND PROCEDURAL HISTORY

On December 26, 2006, around 10:00 p.m., Officer John Perrine (Officer Perrine) of the Indiana State Police was traveling North on Bergen Boulevard, a four lane divided highway in Hamilton County, Indiana. As Officer Perrine approached 146th Street, he observed a white Buick automobile, in the left lane, directly in front of his patrol car. The driver of the vehicle, later identified as Watson, directed the vehicle into the right lane without signaling a lane change. The vehicle veered halfway into the right lane, back into the left lane, reestablishing itself in the left lane without signaling. After noticing the unsafe lane movement, Officer Perrine followed the vehicle to a stop sign at 146th Street. Watson activated the vehicle's left turn signal and made a wide left turn onto 146th Street. The

vehicle's turn signal remained activated for several moments after the turn's completion. Officer Perrine observed Watson's vehicle nearly run off the roadway to the right and correct to the left, and move onto the roadway again. Officer Perrine then initiated a traffic stop.

Officer Perrine approached the driver's side of the vehicle and asked the driver for his driver's license and vehicle registration. The driver provided Officer Perrine with an Indiana learner's permit, from which Officer Perrine was able to identify the driver as Watson. As Officer Perrine spoke with Watson, he smelled the odor of an alcoholic beverage on Watson's breath and observed that Watson's eyes were watery and bloodshot. Officer Perrine asked Watson if he had consumed any alcohol, to which Watson replied that he had one beer at a club.

Officer Perrine asked Watson to step out of the vehicle and directed him to the rear of his vehicle, while Officer Perrine returned to his cruiser with Watson's learner's permit. Officer Perrine summoned backup so that he could perform field sobriety tests. After checking Watson's identification, Officer Perrine returned to the rear of Watson's vehicle, where Watson was leaning on the trunk. Officer Perrine informed Watson that he was going to perform field sobriety tests to determine whether Watson was too intoxicated to operate a vehicle. Officer Perrine administered the Horizontal Gaze Nystagmus Test, the One Leg Stand Test, and the Walk and Turn Test. Officer Perrine also asked Watson to recite the alphabet from the letter "C" to the letter "S", to count backwards from 60 to 35, and to touch the tip of his thumb to the tips of his forefingers. (Tr. pp. 25-27). Watson failed each of the six field sobriety tests administered by Officer Perrine. Officer Perrine also offered Watson a

portable breath test, which Watson completed. The results of the portable breath test gave a positive indication for the presence of alcohol.

On May 2, 2007, the State filed an Information charging Watson with Count I, operating a vehicle while intoxicated, in such a manner that a person was endangered, a Class A misdemeanor, I.C. §§ 9-30-5-2(a) and 9-30-5-2(b), and Count II, operating a motor vehicle with an alcohol concentration equivalent to at least fifteen hundred grams of alcohol per 100 milliliters, a Class A misdemeanor, I.C. § 9-30-5-1(b). On February 13, 2008, Watson was tried before the bench and found guilty of Count I and not guilty as to Count II. Watson was sentenced to 180 days in the Hamilton County Jail, to be served consecutively to an earlier, unrelated sentence.

Watson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Admissibility of Portable Breath Test

Watson argues that the court erred when it admitted evidence from the portable breath test. We have previously established our standard of review regarding admissibility of evidence. A trial court has broad discretion in ruling on the admissibility of evidence. *Fentress v. State*, 863 N.E.2d 420, 422-23 (Ind. Ct. App. 2007). Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abuses its discretion. *Id.* at 423. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* However, when there is substantial independent evidence of guilt such that it is unlikely that the erroneously admitted

evidence played a role in the conviction or where the offending evidence is merely cumulative of other properly admitted evidence, the substantial rights of the party have not been affected, and thus, we deem the error harmless. *Robertson v. State*, 877 N.E.2d 507, 514 (Ind. Ct. App. 2007) (quoting *Smith v. State*, 839 N.E.2d 780, 784 (Ind. Ct. App. 2005)).

At trial, Watson objected to the admission of the results of the portable breath test on the basis that the portable breath machine was not certified. Indiana Code section 9-30-6-5 prohibits the admission of results of chemical tests that involve an analysis of a person's breath, unless the test equipment has been approved by the Department of Toxicology. Specifically, Indiana Code section 9-30-6-5(d) provides:

Results of chemical tests that involve an analysis of a person's breath are not admissible in a proceeding under this chapter, I.C. § 9-30-5, I.C. § 9-30-9, or I.C. § 9-30-15 if:

- (1) the test operator;
 - (2) the test equipment;
 - (3) the chemicals used in the test, if any; or
 - (4) the techniques used in the test;
- have not been approved in accordance with the rules adopted under I.C. § 9-30-6-5(a).

Indiana Code section 9-30-6-5(a)(2) requires that the director of the department of toxicology of the Indiana University School of Medicine is responsible for setting the standards and regulations regarding the selection and certification of breath test equipment and chemicals.

During the trial, Officer Perrine testified that the portable breath machine used during the traffic stop was not certified. As a result, we find that it was error for the trial court to admit the results of an uncertified portable breath machine. Nevertheless, we conclude that this error was harmless.

Here, the trial court did not place much, if any, emphasis upon the results of the portable breath test. The trial court stated that the presence of alcohol on Watson's breath "is a very small factor" in determining guilt and "not dispositive, at all" of the question of intoxication. (Tr. pp. 28-29). Officer Perrine's observation that Watson's breath bore the odor of an alcoholic beverage, Watson's eyes were watery and blood shot, and that Watson failed six field sobriety tests, was properly admitted. This evidence, in addition to Watson's testimony that he consumed alcohol earlier in the day, demonstrated that Watson was intoxicated. Thus, Officer Perrine's testimony regarding the results of the portable breath test, was merely cumulative to the properly admitted evidence of Officer Perrine's observation of Watson's demeanor, and did not affect Watson's substantial rights. Therefore, the admission of Officer Perrine's testimony regarding the portable breath test was harmless and does not constitute reversible error.

II. *Sufficiency of the Evidence*

Next, Watson argues that the State failed to present sufficient evidence to sustain his conviction for operating a vehicle while intoxicated, endangering a person. We have previously expressed our standard of review for challenges to the sufficiency of evidence by stating:

Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. [] Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

Perez v. State, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied* (citations omitted).

Under Indiana Code sections 9-30-5-2(a) and 9-30-5-2(b), the State was required to prove beyond a reasonable doubt that Watson operated a vehicle while intoxicated in a manner that endangered a person. Watson asserts that there was no evidence of probative value from which the trial court could have found that Watson was either intoxicated or operating his vehicle in a manner that endangered a person. Intoxication is defined as being “[U]nder the influence of (1) alcohol . . . so that there is an impaired condition of thought and action and the loss of normal control of a person’s faculties to an extent that endangers a person.” I.C. § 9-13-2-86. Additionally,

Evidence of the following can establish impairment: (1) the consumption of significant amounts of alcohol; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of alcohol on the breath; (5) unsteady balance; (6) failure of field sobriety tests; (7) slurred speech.

Fields v. State, 888 N.E.2d 304, 307 (Ind. Ct. App. 2008) (quoting *Ballinger v. State*, 717 N.E.2d 939, 943 (Ind. Ct. App.1999)).

Officer Perrine testified that he observed Watson direct his vehicle into the right lane without signaling a lane change. He noted that Watson’s vehicle weaved halfway into the right lane, back into the left lane, reestablishing itself in the left lane without any signal. Officer Perrine noticed the unsafe lane movement and followed the vehicle to a stop sign, where Watson activated the vehicle’s left turn signal and made a wide left turn. Officer Perrine further observed Watson’s vehicle nearly run off the roadway to the right and correct back to the left, onto the roadway, again. After Officer Perrine initiated a traffic stop, he

observed Watson's watery and blood shot eyes, the odor of an alcoholic beverage on Watson's breath, and conducted six field sobriety tests, which Watson failed.

Watson attempts to discredit Officer Perrine's administration of three of the six tests; nevertheless, the State presented additional substantial evidence to establish Watson's impairment. The evidence provided from the field sobriety tests was merely cumulative of the State's other evidence. Further, field sobriety tests are only one means by which intoxication may be established. *See Beasey v. State*, 823 N.E.2d 759,762-763 (Ind. Ct. App. 2005) (where the officer smelled a strong odor of alcohol, observed that Beasey's eyes were glassy, semi-hooded, and red, and that Beasey slurred his words, the evidence was sufficient to establish the defendant's intoxication, in addition to his failure of three field sobriety tests). Finally, even if Officer Perrine erred in administering three of Watson's six field sobriety tests, Watson does not challenge the administration of the other three failed field sobriety tests. In sum, we conclude that the probative evidence and reasonable inferences drawn therefrom support the trial court's finding that Watson was intoxicated.

Watson also contends that the State failed to prove beyond a reasonable doubt that he operated his vehicle in a manner that endangered a person. The endangerment element does not require that the State prove a person other than the defendant was actually in the path of the defendant's vehicle or in the same area in order to obtain a conviction. *Staley v. State*, ____ N.E.2d ____, 2008 WL 4792418 (Ind. Ct. App. Nov. 5, 2008). "Endangerment is proved by evidence that the defendant's condition or manner of operating the vehicle could have endangered any person, including the public, the police, or the defendant." *Weaver v.*

State, 702 N.E.2d 750, 753 (Ind. Ct. App. 1998) (quoting *Blinn v. State*, 677 N.E.2d 51, 54 (Ind. Ct. App. 1997)). Here, Watson's unsafe driving and his intoxication endangered both himself and his passenger. Therefore, we conclude that the State presented evidence of probative value and reasonable inferences drawn therefrom, to prove beyond a reasonable doubt that Watson's intoxicated condition and manner of operating the vehicle was sufficient to establish endangerment.

CONCLUSION

For the foregoing reasons, we find that the trial court's admission of the results of the portable breath test, indicating the presence of alcohol on Watson's breath, was harmless error. Furthermore, we conclude that the State presented sufficient evidence to convict Watson of operating a vehicle while intoxicated, endangering a person.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.